

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NOV 5 2002

PATRICK FISHER
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

REGINA ANN EVANS,

Defendant - Appellant.

No. 01-6429
D.C. Nos. 01-CV-277-T and
98-CR-93-T
(W.D. Oklahoma)

ORDER AND JUDGMENT *

Before **KELLY**, **BALDOCK**, and **LUCERO**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Petitioner appeals the denial of her 28 U.S.C. § 2255 motion to vacate, set aside, or correct her sentence on various drug offenses. This court granted petitioner's application for a certificate of appealability (COA) on her *Apprendi* issue and the related claim that her attorney provided ineffective assistance of counsel by failing to pursue the *Apprendi* issue at trial and on appeal. Since the grant of COA, this court has determined that *Apprendi* "is not retroactively applicable to initial habeas petitions." *United States v. Mora*, 293 F.3d 1213, 1219 (10th Cir.) (analyzing *Apprendi* in the context of § 2255), *cert. denied*, No. 02-6125, 2002 WL 31013013 (U.S. Oct. 15, 2002).

The prior grant of COA is therefore withdrawn as improvidently granted. Petitioner's motion to proceed on appeal without prepayment of costs or fees is GRANTED. We VACATE this court's grant of COA and dismiss this appeal.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge